MICHAEL RODAK, JR., CL

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1001

SHELL OIL COMPANY, *Petitioner,*

v.

FRANK MARINELLO, d/b/a Garden Shell Station, *Respondent.*

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

JOSEPH R. MARINIELLO, ESQ.
FIERRO, FIERRO & MARINIELLO, PC.
*Attorneys for Respondent*
230 Main Street
Fort Lee, New Jersey 07024

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

## TABLE OF CONTENTS


Page

TABLE OF CASES CITED ..... ii

STATEMENT OF THE CASE ..... 1

SUMMARY OF ARGUMENT ..... 4

Reasons Why It Should Be Denied

POINT I ..... 4

No Question of Constitutional Preemption by the Landham Trade-Mark Act was Raised by Shell at the Trial or Appellate Level and Nor was It the Basis of the Decision by the New Jersey Supreme Court

POINT II ..... 6

The Decision Below Did Not Retroactively Apply the New Jersey Franchise Practices Act, Nor Did It Unconstitutionally Impair the Contract Rights of Shell Oil Company

POINT III ..... 9

The Validity of the New Jersey Franchise Practices Act was Never Raised Below and the Case Should Not Be Remanded for Further Proceedings on this Issue

CONCLUSION ..... 10

APPENDIX ..... 1a


## TABLE OF CASES CITED


*Avery* v. *State of Alabama*, 308 U.S. 444 (1940) ..... 8
*Bacon* v. *Texas*, 163 U.S. 207 (1896) ..... 8
*Blackburn* v. *Alabama*, 354 U.S. 393 (1957) ..... 10
*Consumers Oil Corporation* v. *Phillips Petroleum Company*, App. No. 73-1597 (3rd Cir. November 12, 1973) ..... 4, 7

Page

*Delmas* v. *Merchants' Insurance Co.*, 81 U.S. 661 (1872) 7
*Detroit United Railway* v. *Detroit*, 242 U.S. 238 (1916) 8
*Druley* v. *Mazo*, 351 U.S. 277 (1955) ..... 5
*Ellsworth Dobbs, Inc.* v. *Johnson*, 50 N.J. 528 (1967) .. 6
*Hanson* v. *Denckla*, 357 U.S. 235 (1958) ..... 5
*Henningsen* v. *Bloomfield Motors, Inc.*, 32 N.J. 358 (1960) ..... 6
*Honeyman* v. *Hanon*, 300 U.S. 14 (1937) ..... 10
*William Mariniello* v. *Shell Oil Company* ..... 9
*Knox* v. *Exchange Bank*, 79 U.S. 379 (1971) ..... 8
*New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U.S. 18 (1888) ..... 8
*People of the State of New York* v. *Maltbie*, 303 U.S. 158 (1938) ..... 5
*Sevier* v. *Haskell*, 81 U.S. 12 (1872) ..... 7
*Southern Wisconsin Railway* v. *Madison*, 240 U.S. 457 (1916) ..... 8
*Southwestern Bell Telephone Co.* v. *State of Oklahoma*, 303 U.S. 206 (1938) ..... 5
*Tarver* v. *Keach*, 82 U.S. 67 (1873) ..... 7
*United States* v. *Bethlehem Steel Corporation*, 315 U.S. 289 (1942) ..... 11
*Walters* v. *City of St. Louis*, 347 U.S. 231 (1954) .... 5

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

---

No.

---

SHELL OIL COMPANY, *Petitioner,*

v.

FRANK MARINELLO, d/b/a Garden Shell Station, *Respondent.*

---

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

---

### STATEMENT OF THE CASE

In July of 1959, Frank Marinello became an operator of a Shell gasoline station located at Route 5 and Anderson Avenue in Fort Lee, New Jersey. Marinello and a partner entered into a lease with Shell for a one year term (N.J. App. 87A).[1] From that time until

[1] N.J. App. refers to the Appendix filed with the New Jersey Supreme Court.

1965, Marinello and his partner operated said station and received from time to time thereafter dealer lease and dealer agreements between themselves and Shell. Various amendments also were signed by the parties, all at the insistance of Shell. There was, as the trial court found, no negotiation of terms and the only discussion concerning any new lease would be the amount of rent which was generally increased as new leases were signed in accordance with Shell's rent structures for the district (N.J. App. 38A).

In 1965, Marinello and Larusso, his partner, terminated their relationship. Marinello continued as the operator of the service station located in Fort Lee, New Jersey. This transfer and all agreements in connection therewith were assented to by Shell (N.J. App. 38A-39A). From 1965 until 1969 all leases and dealer agreements were executed between Shell and Frank Marinello, all calling for a term of one year (N.J. App. 124A, 123A, 121A, 119A,( 118A). In 1969 a new lease and dealer agreement were executed by Shell and Marinello on forms prepared by Shell. The leases were in substance identical to the prior leases and dealer agreements, except that the term was for three years (N.J. App. 82A, 93A). At the expiration of the term of the 1969 dealer lease and dealer agreement, Shell refused to renew or enter in a new agreement, although Marinello had always substantially conformed with all of his obligations to the Shell Oil Company, and had been a successful dealer (N.J. App. 60A).

After issue was joined, and a complete trial of the matter held before the Superior Court of New Jersey, a decision was rendered (N.J. App. 36A-76A) in which the court made a factual determination that Marinello

had substantially performed his obligations under the terms of the lease and dealer agreement (N.J. App. 55A-60A), and found, as a matter of fact, that Marinello had realized a reasonable level of performance with respect to his sales at the location where he operated (N.J. App. 61A). The court found further, as a matter of fact, that Shell had been guilty of unlawful and unfair trade practices in its dealings with Marinello, and raised four issues to be specifically answered (N.J. App. 44A):

> 1.) Does the Franchise Practices Act N.J.S.A. 56:10-1, et seq. apply to this litigation?
>
> 2.) Was there any limitation on Shell's right to possession of the premises by reason of the relationship between Shell and Marinello?
>
> 3.) Did Marinello substantially perform his obligations under the relationship, and
>
> 4.) Was Shell barred from seeking relief by reason of unclean hands?

That Marinello had performed his obligations under the terms of the lease and dealer agreement was a factual finding of the court. Issue 4.) was also answered affirmatively after the finding of fact made and referred to heretofore. Issue 1.) regarding the Franchise Practices Act was answered in the negative. The court found that the Franchise Practices Act did not apply to the case between Marinello and Shell (N.J. App. 44A-45A). The last issue was decided in favor of Marinello wherein the Court held that as a result of the relationship between the parties, the lack of negotiation, the dominance of Shell and the public policy of the State of New Jersey that Shell could not unilater-

ally terminate the relationship between Shell and Marinello unless Marinello had failed to substantially perform his obligation under the terms of the agreement (N.J. App. 47A-51A). The New Jersey Supreme Court held that the lease and dealer agreement were a single business relationship, and that any provision giving Shell the right to terminate on ten days notice is void as against the public policy of the State (A-9).

## SUMMARY OF ARGUMENT

### Reasons Why It Should Be Denied

The decisions below have, as their foundation, clearly stated and supported by the factual findings of the trial court, the public policy of the State of New Jersey. The pleadings below and the issues framed by both Shell and Marinello in the Court below were not the issues attempted to be raised by the petition for this writ. The substantial Federal question which Shell attempts to raise in its writ were non-existent in the State court. In addition, the Court of Appeals for the Third Circuit in *Consumers Oil Corporation* v. *Phillips Petroleum Company,* App. No. 73-1597 (3rd Cir. November 12, 1973) has affirmatively answered those Federal questions which Shell allegedly maintains were raised in the State court in this matter.

## POINT I

### No Question of Constitutional Preemption by the Lanham Trademark Act Was Raised by Shell at the Trial or Appellate Level and Was Not the Basis of the Decision by the New Jersey Supreme Court

At no time in the pleadings prior to trial, during the trial or in its brief to the New Jersey Supreme Court did Shell Oil Company raise the question of Federal preemption by the Lanham Trade-Mark Act. The

first time the issue was mentioned was in Shell's petition for rehearing (A-11). The state courts therefore, never considered such an issue nor based its decision in any way upon it. It is a long settled rule of this Court that it will not undertake to review what the court below did not decide, *Walters* v. *City of St. Louis,* 347 U.S. 231 (1954). It follows logically that if the issue was not presented to the court, it was not necessary to the determination of the case. If it was not necessary to the determination of the case, a petition on its basis will not lie, *Southwestern Bell Telephone Co.* v. *State of Oklahoma,* 303 U.S. 206 (1938); *People of the State of New York* v. *Maltbie,* 303 U.S. 158 (1938); *Druley* v. *Mazo,* 351 U.S. 277 (1955).

The fact that Shell raised this question on its petition for rehearing does not entitle it to have it passed upon by this Court. Shell should be absolutely precluded from having this issue now determined, *Hanson* v. *Denckla,* 357 U.S. 235 (1958). Shell further argues that the New Jersey court's determination that the business relationship between the parties constituted a "franchise" surprised them, and raised for the first time the question of a conflict between state law and the federal trade law. Since the inception of this action, Marinello has contended that the relationship was one more than a landlord-tenant relationship. The trial court itself said:

> "... it should be apparent that we are not dealing here with a traditional landlord-tenant relationship, but with what is essentially a form of commercial venture—a franchise—for the marketing of Shell's products ... A-24."

A reading of the trial court's opinion and a review of the pleadings in this case make the allegation of

surprise one of sophistry. Shell had ample opportunity in which to brief and raise the effects of the trial court's holding on the Landham Trade-Mark Act, and yet failed to do so. Shell's brief, which ran over 100 pages, to the New Jersey Supreme Court, certainly could have raised this argument.

As a result of the above, Shell cannot be heard to now contend that the lower court's finding and the Supreme Court of New Jersey's holdings surprise them.

## POINT II

### The Decision Below Did Not Retroactively Apply the New Jersey Franchise Practices Act, Nor Did It Unconstitutionally Impair the Contract Rights of Shell Oil Company

The State of New Jersey has a history of formulating precedent-setting public policy in the area of contractual freedom. The New Jersey Supreme Court has said that the best interest of society demand that persons should not be unnecessarily restricted in their freedom to contract, but that contractual provisions which clearly tend to the injury of the public in some way, will be declared void as against public policy, *Henningsen* v. *Bloomfield Motors, Inc.,* 32 N.J. 358 (1960). It is this public policy of the State of New Jersey which the lower court was implementing in upholding the Shell-Marinello agreements void.

In the course of its opinion, both courts below noted the dominance of Shell in respect to the bargaining power of the parties and held that in effect, the freedom to contract in these circumstances was in effect, non-existent. By citing pertinent provisions of *Ellsworth Dobbs, Inc.* v. *Johnson,* 50 N.J. 528 (1967), and *Henningsen,* supra, the Court made it clear that such a relationship was contrary to the existing public

policy of the State. Both Courts emphatically and clearly in their opinions, in the arguments before them, and in the trial of the matter held that the New Jersey Franchise Practices Act could not be applied to this case. There could be no clearer position and rebuttal of Shell's argument than the very opinions which they claim raises the issue. The New Jersey Franchise Practices Act and its application to the litigation below was held by both lower courts in favor of Shell Oil Company. Both courts agreed with Shell's contention that the Franchise Practices Act did not apply to the Shell-Marinello agreements.

In *Consumers Oil Corporation* v. *Phillips,* supra, which was decided after *Shell* v. *Marinello,* and in which the Federal Court of Appeals was cognizant of, held that before they could rule on the Franchises Act of New Jersey they must wait until the New Jersey Supreme Court rules on said Act. This abstention, because of a failure of the states highest court to rule upon the issue, is in effect an affirmative statement by that court that *Shell* v. *Marinello* and the decision of the New Jersey Supreme Court in that matter, was not an application of the New Jersey Franchise Practices Act, but was decided solely on the basis of the public policy of the State of New Jersey.

It is a basic and settled principle and position of this Court that a decision of the state court holding a contract void on principles of public policy does not present a Federal question, *Sevier* v. *Haskell,* 81 U.S. 12 (1872); *Tarver* v. *Keach,* 82 U.S. 67 (1873); *Delmas* v *Merchants' Insurance Co.,* 81 U.S. 661 (1872). This is consistent with the constitutional balance between state and federal sovereignty, and in order to preserve it, this Court has always been reluctant to interfere

with a state's determination of local social policy, *Avery* v. *State of Alabama,* 308 U.S. 444 (1940).

In order to raise the substantial issue of impairment of contract, Shell must show this Court that the obligation which allegedly was impaired was impaired by a subsequent statute of this State which has been given effect by the state court, *Detroit United Railway* v. *Detroit,* 242 U.S. 238 (1916); *Southern Wisconsin Railway* v. *Madison,* 240 U.S. 457 (1916). There is not sufficient grounds to raise the issue of impairment of contract if the decision of the state court was based upon grounds independent of statutory law, *Bacon* v. *Texas,* 163 U.S. 207 (1896); *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.,* 125 U.S. 18 (1888).

This is the situation in which this court is now confronted. The New Jersey Supreme Court expressly stated that it was not relying on the Franchise Practices Act, but is implementing the already existing public policy of the state. The common law was the controlling factor, and as such, Shell's contentions of impairment of contract is invalid. The rationale for this Court's ruling and refusal to hear each decision arising out of a state court merely because it impaired the contract rights of individual parties was stated succinctly in *Knox* v. *Exchange Bank,* 79 U.S. 379 (1971), and clearly applies to this case. The court said:

> "We are not authorized by the Judiciary Act . . . to review the judgment of the state courts because their judgments refuse to give effect to valid contracts or because those judgments in their effect impair the obligation of contracts. If we did, every case decided in a state court could be brought here when the party settling up a contract alleged that the court had taken a different view of its obligation to that which he held."

The court should therefore refuse to review the contention of Shell that the state court decision adversely affected what it thought was its contract right, and therefore was in violation of the contract clause of the Federal Constitution.

## POINT III

### The Validity of the New Jersey Franchise Practices Act Was Never Raised Below and the Case Should Not Be Remanded for Further Proceedings on This Issue [2]

Shell alleges in its petition that the court below failed to consider issues concerning the constitutional validity of the Franchise Practices Act. This conten-

---

[2] It should be noted that in the case of *William Mariniello* v. *Shell Oil Company*, in the United States District Court for the District of New Jersey, No. 1506-72, by unpublished opinion dated January 15, 1974, District Judge Coolahan held,

> ". . . that the State of New Jersey cannot interfere with defendant Shell's federal rights (1) to limit the grant of its federally registered trademarks to its licensees for the stated period of time spelled out in its leases, (2) to regain full and exclusive use of its licensed-out trademarks when that period of time has expired, unless renewal or rearrangement of the lease and dealer agreement is otherwise mutually made, and (3) not to suffer any adverse consequences (*e.g.*, having to defend an action brought in a state court for injunctive relief and damages, *N.J.S.A.* 46:10-10) that may stem from its so limiting the grant of its federally registered trademarks."

The Court further held that:

> "The decision of the Supreme Court of New Jersey in *Shell Oil Co.* v. *Marinello*, by utilizing N.J.S.A. 56:10-1 *et seq.* to whittle the rights of the owner of a federally registered trademark and correspondingly to enlarge the rights of a licensee in such a trademark, collides with the Lanham Act's preemptive grant to its owner of total control of a federally registered trademark. Consequently, insofar as the *Shell* decision regulates the rights of owners of federally registered trademarks and the rights of their licensees, it is invalid and inapplicable."

tion is absolutely correct. But contrary to Shell's statement, Shell never raised the validity of the Act nor was it ever drawn into issue by Shell.

Again, as in Point I of this brief, since they were not in issue, logically they form no basis for a decision. If no basis for decision, then again logically, no federal question was passed upon by the state court.

Remanding, as Shell asks in Point III of its petition, should only be done so as to amend the record to show the nature of the federal question presented, how it was raised, and the grounds of its disposition, *Honeyman* v. *Hanon,* 300 U.S. 14 (1937); *Blackburn* v. *Alabama,* 354 U.S. 393 (1957). However, in this case there is no uncertainty as to the issues passed upon by the New Jersey court. The decision was based on state grounds and the validity of the New Jersey Franchise Practices Act, and all of its constitutional ramifications raised for the first time now by Shell, were not considered. Certainly, a remand to the lower court is not the proper remedy for the issues now raised for the first time by Shell. It would serve no purpose to raise the issue of the constitutionality of the New Jersey Franchise Practices Act in this litigation, where throughout the litigation, Shell's contention that the Franchise Practices Act was not applicable to this litigation, was upheld in both the trial and the appellate court.

## CONCLUSION

Each of the points raised by the petitioner in this writ of certiorari are defective. Clearly, the state court's decision was based upon state public policy. Federal questions of the magnitude presented in the

petition by Shell were not raised below, did not affect the decision, and were not a part of the decision.

The contention of Shell that the courts below failed to discuss these issues is true, but is the fault of Shell for not having raised them at the proper period in the proceedings.

Moreover, the court has stated succinctly in its opinion that it was not necessary to discuss the federal question, as the case could be and was decided solely on state grounds. Shell contended that the decision below radically "alters the time honored and accepted method of conducting interstate marketing operations in this Country" (p. 24 of petition). That is not a ground for this Court to grant certiorari. What the court below did alter in the State of New Jersey was the tradition of dictating to dealers how they should operate their gas stations, the tradition of the velvet glove which has within it the fist of command, the tradition of loathing and distain for the gasoline operator. It may have been a time honored and accepted method of conducting Shell's operations in this Country, but it certainly wasn't a method of equality and justice. As Mr. Justice Frankfurter said in the *United States* v. *Bethlehem Steel Corporation,* 315 U.S. 289, p. 326 (1942):

> "But is there any principle which is more familiar or more firmly imbedded in the history of Anglo-American law than the basic doctrine that courts will not permit themselves to be used as instruments of inequality and injustice. Does any principle in our law have a more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other."

For the reasons stated above, the Court should not grant the petition for a writ of certiorari.

Respectfully submitted,

FIERRO, FIERRO & MARINIELLO, P.C.

JOSEPH R. MARINIELLO